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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MC BRANDS, LLC, a limited liability company, Plaintiff, vs. CWNevada, LLC, a limited liability company; DOES 1-10; and ROE CORPORATIONS 1-10, inclusive, Defendants.	Case No.: 2:19-cv-00481 **PLAINTIFF MC BRANDS, LLC'S REPLY IN SUPPORT OF EMERGENCY MOTION TO REMAND**

In filing its Opposition to MC Brands' Emergency Motion, CWN confirms that it removed on diversity grounds based on incorrect assumptions regarding MC Brands' LLC membership rather than facts pleaded in MC Brands' Complaint or otherwise learned during discovery. Moreover, in admitting it failed to properly consider all bases for removal, CWN asks for a second bite at the apple to assert federal question jurisdiction based on its incorrect reading of the non-binding case of *PharmaCann Penn, LLC v. BV Development Superstition RR, LLC*. CWN also claims the forum defendant rule does not apply to it. Finally, CWN nonsensically argues that MC Brands somehow waived the Agreement's forum selection clause by filing a Complaint to enjoin CWN's competing products based on its misappropriation of

MC Brands' trade secrets and its violation of the licensing agreement's noncompetition provision.

Simply put, CWN's efforts are nothing more than an attempt to distract from its own failures in hastily and improperly removing this case so that it could continue misappropriating MC Brands' trade secrets. On any of the grounds cited in MC Brands' Motion, CWN's removal was improper, and MC Brands is entitled to recover its attorney's fees and costs incurred in filing the Motion.

DATED this 11th day of April, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

A. CWN's Argument That MC Brands "Waived" the Forum Selection Clause in the Parties' Licensing Agreement is Nonsensical.

Given its attempts to avoid attorney's fees and costs for its frivolous removal, CWN understandably spends the bulk of its Opposition arguing about diversity and federal question jurisdiction and blaming MC Brands for not helping CWN cure its improper removal. What CWN cannot do is explain to the Court why the express forum selection clause in the parties' licensing agreement is unenforceable when it requires that this case be heard in Nevada state court.

Contrary to CWN's assertions, the forum selection clause in paragraph 13(h) is unambiguous and enforceable as shown by clear case law cited in MC Brands' Motion.[1] Through that clause, CWN contractually agreed to have the case heard in Nevada state court, and that contractual language was plain and obvious before CWN removed it from state court. As CWN has done in this case and several others, however, it refused to be constrained by contracts it voluntarily signed. Instead, it frivolously removed this case.

That removal was improper, but CWN now nonsensically argues that MC Brands somehow "waived" the forum selection clause in paragraph 13(h) because MC Brands chose to file suit under paragraph 13(j) to obtain injunctive relief preventing CWN's misappropriation of MC Brands' trade secrets. *See* Opposition at 14:25-15:19. But paragraph 13(h) clearly gives MC Brands the right to bring court proceedings "to obtain in state courts in Nevada preliminary injunctive relief or other interim remedies." Exh. 1 to Motion at ¶ 13(j). That is precisely what MC Brands did in state court, obtaining a temporary restraining order from Judge Elizabeth Gonzalez before CWN improperly removed this case to avoid Judge Gonzalez's written order. *See* Exh. 1 to Notice of Removal ("Notice"), ECF No. 1-2 (Pages 164-65 of 173). There was nothing inappropriate under paragraph 13(h) about MC Brands' requested relief.[2]

Moreover, CWN cites not a single case suggesting that, even if CWN's interpretation of paragraph 13(j) was correct, MC Brands' actions would constitute a contractual waiver of the forum selection clause. *See* Opposition at 14:25-15:19. Pursuant to Nevada law, contractual waiver must be clear and unambiguous before the Court can find MC Brands waived a contractual right. *See Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 483, 894 P.2d 342, 346 (1995) ("To establish waiver, the party asserting waiver must prove that there has been an intentional relinquishment of a known right."). Here, there is nothing suggesting MC Brands waived the forum selection clause, much less that it was clear and unambiguous. On the

[1] MC Brands provided this case law to CWN's counsel before MC Brands filed its Emergency Motion. Just as CWN does now in its Opposition, CWN's counsel repeatedly ignored the implications of this forum selection clause in refusing to withdraw CWN's Notice of Removal. *See* Exh. A to Kay Decl., ECF No. 6.

[2] Notably, CWN did not make this argument in front of Judge Gonzalez, which would have been a threshold issue to avoid the temporary restraining order. Instead, CWN is making it up on the fly in attempting to justify its improper removal.

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contrary, MC Brands performed the licensing agreement as required to obtain injunctive relief from Judge Gonzalez.

Consequently, there is no merit to CWN's waiver argument. It is factually baseless, at odds with the licensing agreement's plain language in paragraphs 13(h) and 13(j), and unsupported by case law.

B. <u>This Case is Not Exceptional and the Forum Defendant Rule Applies</u>.

Worse than CWN's waiver argument is its argument that the forum defendant rule does not apply because it would lead to an "absurd" result. *See* Opposition at 7:9-18. CWN cites *Safe Air for Everyone v. United States EPA* and *Watanabe v. Lankford* to claim that every case involving cannabis would produce an "absurd" result if heard in state court and that the Court should presumably assert diversity jurisdiction over this case and every other one involving cannabis. *See* Opposition at 7:10-18.

Again, however, this is argument is without merit and is unsupported by the case law. The forum defendant rule recognizes that diversity jurisdiction is intended to protect an out-of-state defendant from being "hometowned" in a state court, a protection that is not needed when the defendant resides in the forum state. *See Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) ("Removal based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court."). Diversity jurisdiction is not intended, however, to expand the Court's jurisdiction to every case touching upon a subject matter that might tangentially involve a federal law. *See id.* at 940-41 (noting removal jurisdiction is a "creature of statute" and violating the forum defendant rule "prevents the district court from exercising jurisdiction over the matter.").

Safe Air and *Watanabe* illustrate how misguided CWN's argument is on this point. *Safe Air* does not involve diversity jurisdiction at all but instead the Ninth Circuit's statutory review of the Clean Air Act ("Act") and the Environmental Protection Agency's approval of the State of Idaho's State Implementation Plan ("SIP") under the Act. *See* 488 F.3d 1088, 1091. The Ninth Circuit held that following the plain language of the Act prohibiting field burning in the SIP would not lead to an absurd result. *See id.* at 1099. That CWN would cite this case as somehow

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supporting its claim that the forum defendant rule does not apply evidences how far CWN is reaching to justify its improper removal.

Watanabe is no better, as that Hawaii case held that removal based on complete diversity before a plaintiff had served an in-state defendant would not lead to an absurd result. *See* 684 F. Supp. 2d 1210, 1219 (D. Haw. 2010). In *Watanabe*, the plaintiff delayed in serving an in-state defendant, and so an out-of-state defendant removed based on diversity before the plaintiff served the in-state defendant. *See id.* The plaintiff ultimately served the in-state defendant and moved for remand based on the forum defendant rule. *See id.* The *Watanabe* court found that the forum defendant rule did not apply because the plaintiff had not served the in-state defendant at the time of removal, and thus the removal statute's plain language allowed removal. *See id.* The plaintiff argued this would lead to an "absurd" result, but the court rejected this based on the statute's plain language, which counted only "joined and served" defendants for the purposes of the forum defendant rule. *See id.* Consequently, it was not "absurd" to enforce the statute's plain terms. *See id.*

Here, as with its other arguments, CWN offers no citation supporting its argument that enforcing the plain language of the forum defendant rule would lead to an absurd result. On the contrary, just as the *Watanabe* court did, this Court should enforce the plain language of the removal statute and apply the forum defendant rule to remand this case. CWN is a Nevada citizen, it was joined and served at the time of removal, and so there is no risk that it will be "hometowned" in Nevada state court.[3]

C. Diversity Jurisdiction Is Not Present and CWN Admits It Rushed to Remove the Case Rather Than Confirming Complete Diversity.

1. CWN made no effort to satisfy its burden to properly plead diversity jurisdiction.

CWN attempts to turn the burden of proof for removal on its head by blaming MC Brands for not providing informal discovery to CWN regarding MC Brands' members. *See*

[3] Indeed, other than this one, CWN has at least three other open cases in Nevada state court in front of Judges Gonzalez, Allf, and Bare. It has not tried to remove any of them because of purported state court prejudice against it as a Nevada resident.

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Opposition at 5:15-7:8. CWN complaints that MC Brands would not provide CWN with the identity of MC Brands' Nevada member and so CWN assumed MC Brands was a Colorado limited liability company because MC Brands was formed in Colorado and its "founders and management are all from Colorado or states other than Nevada." *See id.* at 7:1-8.

There is a "strong presumption against removal" and removing parties must properly establish removal based on more than mere assumptions. *Kern v. State Farm Mut. Ins. Co.*, 2014 WL 6983241 at *2 (D. Nev. 2014). Moreover, the residence of the "founders and management" of an LLC have no bearing on its citizenship for diversity purposes. *See Johnson v. Columbia Properties Anchorage LP*, 437 F.3d 895, 899 (9th Cir. 2006). Instead, it has long been the rule that "an LLC is a citizen of every state of which its owners/members are citizens." *Id.* That membership is determined at the time of removal, not the time the company was founded. *See id.* Thus, before removing the case, CWN was required to determine the residence of MC Brands' members rather than assuming it.

CWN admits that it failed to do so before removing this case. Specifically, it claims that, in removing a case, it "is not unreasonable **to assume** that a Colorado company would be comprised of Colorado based members when its principal place of business is in Colorado." Opposition at 7:23-25 (emphasis added). Yet that is precisely what it is. Limited liability companies frequently have members in multiple states. It is unreasonable to assume that, solely because an LLC does business in a specific state, all its members reside there. Indeed, from its filings in other cases, it appears that CWN has members that reside in other states, though it does business only in Nevada. CWN has offered no reason why it applied a different standard to MC Brands than its own company profile reveals.

Additionally, if CWN truly wanted to learn the specific name of MC Brands' members to establish complete diversity before removal, it had a clear pathway through discovery to do so, as Judge Gonzalez expressly permitted the parties to serve written discovery before the scheduled April 19, 2019 injunction hearing. *See* Exh. 1 to Notice, ECF No. 1-2 (Page 166 of 173). CWN could have completed discovery before the April 19 hearing and determined all the facts it needed to establish the residence of MC Brands' members and therefore the company's

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residency for diversity purposes. Instead, CWN did not serve any discovery requests before removing based on assumption.[4]

Moreover, MC Brands expressly represented to CWN before filing the Motion that MC Brands had a Nevada-based member, DL Investment Holdings, LLC. *See* Kay Decl. at Exh. A, ECF No. 6. Because CWN carries the burden of proving removal and establishing this Court's jurisdiction, MC Brands has no obligation to provide CWN with informal discovery or otherwise carry CWN's burden for it. Instead, CWN had procedural tools available to it to discover MC Brands' members, and it failed to use them.

Finally, CWN has made no effort whatsoever to satisfy the *Johnson* standard or even attempt to apply it. *See Johnson*, 437 F.3d at 899. Contrary to *Johnson*, CWN's Notice does not indicate either CWN's or MC Brands' membership. *See* Notice at ¶ 1, ECF No. 1. Thus, CWN has not established its own citizenship sufficient to confer diversity jurisdiction upon the Court, much less that of MC Brands. Indeed, CWN makes no effort to do so, as it applied the incorrect "principal place of business" test to both CWN and MC Brands in its Notice. *See id.* After MC Brands filed the Motion pointing out the *Johnson* standard and CWN's faulty Notice, CWN filed its Removal Statement, which again applies the incorrect "principal place of business" standard. *See* Statement of Removal at ¶ 3, ECF No. 10.

Simply put, if CWN truly believed removal based on diversity was appropriate, it would have made even a meager attempt to apply the *Johnson* test to its own members. Instead, CWN completely failed to even attempt to carry its burden on removal.

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[4] CWN suggests the 30-day removal deadline was approaching and so it had to remove based on incomplete information. *See* Opposition at 3:20-24. But this is incorrect. 28 U.S.C. § 1446(b)(3) states that, if the initial pleading does not provide sufficient facts to remove the case, "a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may be ascertained that the case is one which is or has become removable."

Because MC Brands' Complaint did not list the residence of its members, the case was not removable by reference to the initial pleading, and so there was no 30-day removal deadline for purposes of diversity jurisdiction. Instead, the only removal deadline was the one-year mark set by 28 U.S.C. § 1446(c)(1), leaving CWN plenty of time to conduct discovery to ascertain MC Brands' members and their residences. Had CWN properly conducted this discovery rather than improperly and prematurely removing based on assumption, CWN would have learned complete diversity was not present.

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2. Complete diversity is not present.

For the purposes of this argument, MC Brands will assume that CWN's members exclusively reside in Nevada.[5] MC Brands also has a Nevada-based member, DL Investment Holdings, LLC. *See* Kay Decl. at Exh. A, ECF No. 6; *see also* Brown Decl. at ¶¶ 4-5, ECF No. 7. MC Brands has provided a declaration from one of its employees, Kayla Brown, who has personal knowledge of its members because she "routinely communicate[s] with the members of MC Brands about matters related to MC Brands' operations." Brown Decl. at ¶ 4, ECF No. 7. Brown avers that one of MC Brands' members is DL Investment Holdings, LLC, and that the lone member of DL Investment Holdings, LLC is a Nevada resident. *See id.* at ¶ 5. She also states that DL Investment Holdings, LLC was a member of MC Brands when it filed the Complaint and when CWN removed this case. *See id.* at ¶ 6. Consequently, complete diversity does not exist.

Remarkably, however, CWN asks that Court to strike Brown's declaration because she is a mere "legal assistant employed by MC Brands" and because CWN somehow believes the best evidence rule applies to exclude Brown's declaration. *See* Opposition at 5:20-6:8. The first assertion is misplaced (and offensive) in that Brown is not only an executive legal assistant but one who graduated law school and recently sat for the bar exam in the State of Colorado. *See* Brown Decl. at ¶ 1, ECF No. 7. Intimating that she is somehow incompetent or untrustworthy because of her title has no place in this litigation. *See* Opposition at 6:15-19 (ignoring Brown's statements to argue the Court must exclude Brown's declaration because CWN claims she has no personal knowledge of MC Brands' members).

CWN's citation to the best evidence rule is similarly incorrect. *See* Opposition at 5:24-6:8. By its plain terms, which CWN ironically quotes, the best evidence rule applies only when a party seeks to prove the contents of a document. *See* FRE 1002; *see also* Opposition at 5:25-26. The classic application occurs when a party seeks to prove the contents of a contract and the opposing party invokes the best evidence rule to require production of the contract. *See, e.g.,*

[5] Of course, MC Brands and the Court cannot be sure of this because CWN has not provided the Court with any information about CWN's members.

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Warden v. PHH Mort. Corp., 799 F. Supp. 2d 635, 642 (N.D.W. Va. 2011). Here, however, MC Brands does not seek to prove the contents of a document. Instead, it seeks to prove it has a Nevada-based member, and the forms of evidence that can prove that fact include corporate governance documents, witness testimony, etc.[6] Because the best evidence rule does not "set up an order of preferred admissibility, which must be followed to prove any fact," Brown's declaration based on personal knowledge does not implicate the best evidence rule. *United States v. Gonzales-Benitez*, 537 F.2d 1051, 1053 (9th Cir. 1976).

CWN also cites FRE 602 and 803 to claim that Brown does not have personal knowledge of MC Brands' members and that she is relying on hearsay to aver their residence. CWN again invents an argument, as Brown's declaration states that she is familiar with MC Brands' members not just from reading corporate governance documents but also from "routinely communicat[ing] with the members of MC Brands about matters related to MC Brands' operations." Brown Decl. at ¶ 4, ECF No. 7. Thus, she plainly has personal knowledge of MC Brands' members and their residences, and her declaration is admissible.

In one final misapplication the Federal Rules of Evidence, CWN claims Brown's declaration does not meet the requirement of FRE 901 regarding authenticity because she does not provide the corporate governance documents referenced in her declaration. But Brown is not attempting to introduce corporate governance documents into evidence, and so she has no obligation to authenticate them under FRE 901. *See* FRE 901(a) (noting a witness must authenticate an item admitted into evidence by producing evidence sufficient to support a finding that the item is what the proponent claims it is). Rather Brown is establishing her personal knowledge of MC Brands' members by explaining that she has reviewed corporate governance documents listing the members and further communicated routinely with them. *See* Brown Decl. at ¶ 4, ECF No. 7. Thus, she need not authenticate any item of evidence.

[6] On this point, CWN blatantly misguides the Court when it states that MC Brands "is trying to prove the contents of certain company records and documents." Opposition at 6:1-34. MC Brands is trying to prove the residence of its members, not the contents of documents that discuss the residence of its members. Even if no documents existed, MC Brands could prove the residence of its members through other forms of evidence, namely witnesses like Brown with personal knowledge of MC Brands' members.

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D. Federal Question Jurisdiction is Not Present.

After admitting that it incorrectly assumed diversity jurisdiction was present, CWN argues the Court should give it a second chance by amending the Notice to include federal question jurisdiction. *See* Opposition at 9:25-10:12. CWN argues that this case implicates federal question jurisdiction because it generically involves cannabis. *See id.* at 10:19-28. CWN claims it did not put forth this argument in the original Notice because CWN's counsel did not think of it until MC Brands filed its Motion. *See* Declaration of H. Stan Johnson ("Johnson Decl.") at ¶ 10, ECF No. 14.

CWN is wrong in two respects though. First, its attempt to assert federal question jurisdiction is untimely under the removal statute. Second, nothing in the case involves federal question jurisdiction, as MC Brands' causes of action are based on state contract law and state law regarding misappropriation of trade secrets.

1. CWN's belated assertion of federal question jurisdiction is untimely.

CWN tries to avoid the 30-day deadline for removal by citing to *Durham v. Lockheed Martin Corp.* and claiming it has only "ascertained within the last ten (10) days that the case is one which is removable pursuant to 28 U.S.C. § 1446(b)(3)." Opposition at 10:6-12. But this is CWN rewarding itself for its own delay in reviewing MC Brands' Complaint and the relevant case law.

"The thirty-day time period for removal starts to run from the defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face the facts necessary for federal court jurisdiction." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006). Here, CWN's only argument regarding federal question jurisdiction is that "cases involving cannabis and cannabis-related issues" all establish federal question jurisdiction because of the Controlled Substances Act. Opposition at 10:27-28. But MC Brands served CWN with a copy of the Complaint on February 25, 2019, and that Complaint plainly indicates that the dispute between CWN and MC Brands involved CWN's breach of the parties' cannabis-related contract and its misappropriation of MC Brands' trade secrets in cannabis products. *See* Notice at ¶ 2, ECF No. 1; *see also* Exh. 1 to Notice, ECF No. 1-2 (Pages 2-19 of 173).

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Thus, CWN knew of the facts purportedly necessary for federal question jurisdiction on February 25, yet CWN's counsel admits he failed to do appropriate research until MC Brands filed its Motion after the 30-day removal deadline. *See* Johnson Decl. at ¶ 10, ECF No. 14. CWN's attempts to assert federal question jurisdiction are therefore untimely because counsel's failure to review relevant case law within the 30-day deadline does not extend the same. CWN knew of all relevant facts purportedly justifying federal question jurisdiction, and yet it failed to include them in its Notice. It cannot do so now.

2. CWN misleadingly applies a non-binding Pennsylvania district court case to argue all cases involving the cannabis industry establish federal question jurisdiction.

CWN cites the Pennsylvania case of *PharmaCann Penn, LLC v. BV Development Superstition RR, LLC* to argue that every case touching upon the cannabis industry involves federal question jurisdiction because cannabis is purportedly illegal under the Controlled Substances Act. *See* Opposition at 10:27-11:16.

But this is not at all what *PharmaCann* held, and it borders on disingenuous for CWN to cite it in this fashion. *PharmaCann* was a case involving a deed to a property at a shopping center. *See* 318 F. Supp. 3d 708, 710 (E.D. Pa. Mar. 16, 2018). The deed expressly included a provision stating that the property could not be used "as a drug store or **for any 'unlawful' purpose**." *Id.* (emphasis added). Accordingly, PharmaCann, the new owner of the property, sued in state court for a declaration that it had the right to open a medical marijuana dispensary despite this contractual language. *See id.* The defendants, PharmaCann's predecessors in interest, removed based on federal question jurisdiction because the deed in question expressly restricted "unlawful activity," which necessarily required resort to both federal and state law. *See id.* at 712.

In upholding removal, the district court judge explained the case was "exceedingly rare" and that it was not purely local, but instead federal, because "at least one key question on the merits is whether a medical marijuana dispensary is 'unlawful' under federal law" and therefore violative of the lease's plain language. *Id.* at 713 and 718, respectively. Thus, the contract's

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plain language required the court to interpret "lawfulness," and a federal court was better positioned to do that than a state court regarding medical cannabis. *See id.* at 718.

Here, however, there is no similar contractual language requiring the Court to make a threshold determination of lawfulness regarding cannabis. Indeed, MC Brands' claims involve both state tort law (misappropriation of trade secrets) and state contract law (breach of the licensing agreement), and the licensing agreement does not require the Court to make a threshold determination of lawfulness. There are no federal claims, and even CWN's illegal contract defense is based on state law.[7] Thus, CWN's attempt to use *PharmaCann* to make every cannabis-related case into one involving a federal question is misguided. Instead, as the *PharmaCann* judge himself stated, *PharmaCann* was an exceedingly rare case with no precedential value to this one.

E. CWN's Improper Removal Justifies Fees and Costs.

CWN's only argument against fees and costs for its improper removal is that MC Brands' counsel's refusal to provide the specific identity of MC Brands' Nevada-based member "undermines their request for fees." Opposition at 8:5-9:16. But this is untrue for several reasons.

First, as described above, CWN had the burden to allege diversity jurisdiction by referencing its members as well as MC Brands' members, and MC Brands had no obligation to provide informal discovery to CWN on this issue. MC Brands identified the Nevada-based member and encouraged CWN to look the member up on the Nevada Secretary of State website. *See* Exh. A to Kay Decl., ECF No. 6. Even this went beyond MC Brands' obligation to provide information.

[7] Judge Gonzalez already rejected CWN's argument regarding the illegal contract defense and the Controlled Substances Act when CWN raised it below. *See* Exh. 1 to Notice, ECF No. 1-2 (Pages 159-160 of 173). Moreover, even at the federal level, federal courts have recognized the illogic of using the illegal contract defense regarding cannabis where the party raising the defense executed a contract with express knowledge of the Controlled Substances Act. *See Mann v. Gullickson*, 2016 WL 6473215 at *8 (N.D. Cal. 2016) (declining to apply the illegal contract defense because the party raising it "knew—or should have known—that marijuana was illegal under federal law."); *see also Ginsburg v. ICC Holdings, LLC*, 2017 WL 5467688 at *8 (N.D. Tex. 2017) (noting the illegal contract defense must take into account "relative moral culpability" of the party raising the defense after signing a contract knowing cannabis was nominally illegal at the federal level).

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Second, separate and apart from MC Brands' membership, CWN has now filed three separate documents and it has yet to provide information on its own members' residences for analysis under *Johnson*. *See* 437 F.3d at 899. Thus, even assuming MC Brands' counsel had provided CWN with informal discovery about MC Brands' members, CWN has still fallen short of its pleading burden on removal because it has not established CWN's own citizenship for diversity purposes.

Third, CWN's "woe is me" approach to carrying its burden to show complete diversity overlooks that the forum defendant rule **and** the forum selection clause in the parties' licensing agreement both prohibited removal even if complete diversity was present. Instead of admitting its error and withdrawing the Notice when MC Brands pointed out these issues before filing the Motion, CWN stuck its head in the sand and ignored them. *See* Exh. A to Kay Decl. ECF No. 6. It did so for only one reason: CWN's goal in removal was to defeat Judge Gonzalez's temporary restraining order by preventing her from signing the written order.

Fourth, and following up on the last point, CWN wishes to avoid MC Brands' "accusations of misconduct" because the fact is CWN is still selling the misappropriated product that Judge Gonzalez enjoined back on March 4, 2019 at the hearing on MC Brands' request for a temporary restraining order. Specifically and unequivocally, Judge Gonzalez enjoined CWN from "continuing the production, marketing, or sale of Kenny's Chocolate Bits and any other products derived directly or indirectly from MC Brands' trade secrets or company intellectual property, products, or technology or marketing those items." Exh. 1 to Notice, ECF No. 1-2 (Pages 164-165 of 173). Despite this clear direction, however, CWN is still selling Kenny's Chocolate Bits, it was displaying t-shirts advertising the products in its stores, and the stores have additional marketing material advertising Kenny's Chocolate Bits. *See* Supplemental Declaration of Rory T. Kay ("Kay Supp.") at ¶¶ 5-7 and Exh. B to same, concurrently filed with this Reply.[8]

[8] MC Brands has twice asked CWN's counsel to remind CWN of its obligations under Judge Gonzalez's ruling, but CWN's counsel has not substantively responded to these requests. *See* Kay Supp. at ¶ 10 and Exhibit D to same.

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Again, CWN's improper removal only had one goal: prevent Judge Gonzalez from signing the temporary restraining order so that CWN could continue to make money off misappropriating MC Brands' trade secrets. CWN accomplished that goal in the short term, but the Court should award MC Brands' attorney's fees and costs in the long term because CWN's removal was nowhere close to objectively reasonable based on relevant case law and the parties' unambiguous licensing agreement. *J.M. Woodworth Risk Retention Group, Inc. v. Uni-Ter Underwriting Management Corp.*, 2014 WL 6065820 at *1 (D. Nev. Nov. 12, 2014).

II. CONCLUSION

CWN's actions do not come in a vacuum. It has a demonstrated history of breaching contracts, not following court orders, and blatantly disregarding anything other than its own desires. *See* Kay Suppl. at ¶ 13 and Exhibit E to same. CWN improperly removed based on assumption and nothing more, solely to frustrate Judge Gonzalez's temporary restraining order while continuing to stack up profits from its misappropriation of MC Brands' trade secrets.

When MC Brands notified CWN of the various ways in which its removal was improper, including providing the relevant case law to CWN, CWN refused to act unless MC Brands gave CWN informal discovery about MC Brands' members. When CWN continued with removal, it improperly ignored the *Johnson* standard, acted as if the forum defendant rule did not apply to it, and made no effort whatsoever to provide the Court with sufficient facts about CWN's own members to establish diversity jurisdiction. Finally, CWN advanced nonsensical arguments trying to avoid the licensing agreement's plain and unambiguous forum selection clause requiring litigation to remain in Nevada state court.

On any of the reasons advanced by MC Brands, the Court can grant the Motion. That CWN fails on every reason advanced by MC Brands shows that sanctions in the form of MC Brands' attorney's fees and costs are appropriate. Accordingly, MC Brands asks the Court to

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grant the Motion and award its attorney's fees and costs incurred in opposing CWN's improper removal.

DATED this 11th day of April, 2019.

McDONALD CARANO LLP

By: /s/ Rory T. Kay

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on April 11, 2019, a true and correct copy of the foregoing **PLAINTIFF MC BRANDS, LLC'S REPLY IN SUPPORT OF EMERGENCY MOTION TO REMAND** was electronically filed with the Clerk of the Court by using CM/ECF service which will provide copies to the following counsel of record registered to receive CM/ECF notification:

/s/ CaraMia Gerard
An Employee of McDonald Carano LLP

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